



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 15, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P.O. Box 1088
Austin, Texas 78767-8845

OR2003-0322

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175023.

The City of Austin (the "city") received a request for the following:

All information concerning the location, recording hours and technical specifications of surveillance cameras currently used by the City of Austin; all current contracts with companies that provide and operate such surveillance cameras; and the current yearly budget allotted for maintaining the use of such surveillance cameras.

You assert that most of the responsive records are not subject to the Public Information Act (the "Act"). As for those records that you claim are subject to the Act, you assert that one is confidential under federal law or is excepted from disclosure under section 552.111 of the Government Code. You claim that the other document is excepted under section 552.108 of the Government Code. Finally, you indicate that the release of some of the submitted documents would implicate the proprietary interests of a third party. Pursuant to section 552.305 of the Government Code, it appears that you have notified the interested third parties of this request for information and of their right to submit arguments to this office explaining why the requested information should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990)

(determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered your arguments and have reviewed the submitted information.

Initially, you argue that, based on our reasoning in Open Records Decision No. 581 (1990), most of the responsive information is not subject to public disclosure under the Act. In Open Records Decision No. 581, this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand you to assert that, like the computer-related information at issue in that decision, the information at issue here should be withheld because its release could potentially expose city systems to unauthorized access and attack. We note that the test articulated in Open Records Decision No. 581 is not that the information be related to the protection of public property, but that the information have *no other significance* than its use as a tool for the maintenance, manipulation, or protection of public property. *Id.* at 6. You have provided no information to satisfy the above-quoted test. *See generally* Gov't Code § 552.301(e)(1)(A) (providing that Act puts burden on requesting governmental body to explain applicability of claimed exceptions). As you have failed to demonstrate that the rationale in Open Records Decision No. 581 is applicable in this instance, we find that all of the submitted information is subject to the Act.

Next, we note that some of the submitted documents are subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(3), (5). As responsive to this request, you have submitted a contract and other working papers relating to the expenditure of public funds. As prescribed

by section 552.022, such information must be released unless it is confidential under other law. You claim that the working papers are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 is a discretionary exception to disclosure that protects the interests of the governmental body. *See* Open Records Decision No. 177 (1977) (construing statutory predecessor). As such, section 552.108 is not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision No. 665 at 2 n.5 (2000) (addressing distinction between mandatory and discretionary exceptions to disclosure). Consequently, the city may not withhold the working papers under section 552.108; thus, these documents must be released.

We now turn our attention to the contract and the submitted manuals. We note that the city does not raise an exception to disclosure for these documents. Instead, it appears that you have notified the interested third parties of their section 552.305 obligations. We note that an interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). Security Management Services ("SMS") responded to the city's section 552.305 notice by claiming that its information was excepted from disclosure under sections 552.101, 552.110, 552.113, and 552.131. The company did not, however, submit any arguments explaining the applicability of these exceptions to its information. Thus, we have no basis to conclude that the contract or the manuals contain SMS' proprietary information.¹ *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, the contract and the manuals must be released.

You also claim that one of the submitted documents is confidential under federal law. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Pursuant to section 300i-2(a)(1) of title 42 of the United States Code, every community water system serving a population of greater than 3,300 persons must conduct an assessment of the vulnerability of its system to a terrorist attack or other intentional acts intended to substantially disrupt the ability of the system to provide a safe

¹The city does not identify the third parties whose interests are implicated by the request nor does it indicate which of the submitted documents it believes contains proprietary information. SMS is the only entity to submit comments to this office. In its letter to this office, SMS requests that "all information regarding the Austin Energy Security Project" be excepted from disclosure. From our review of the submitted information, it appears that only the contract relates to SMS. However, based on the broad language of SMS letter and the fact that no other entities have submitted comments to this office, we presume that the company has a proprietary interest in the submitted manuals as well.

and reliable supply of drinking water. 42 U.S.C. § 300i-2(a)(1) (West 2002). The community water system must then submit the written assessment to the Administrator of the Environmental Protection Agency. 42 U.S.C. § 300i-2(a)(2) (West 2002). Section 300i-2(a)(3) provides that "...all information provided to the Administrator under this subsection and all information derived therefrom shall be exempt from disclosure under section 552 of title 5 of the United States Code [, Freedom of Information Act ('FOIA')]."

You state that in accordance with section 300i-2(a)(1), the city's Water and Wastewater Department is conducting a vulnerability assessment of the city's water and wastewater facilities. You state that since the document at issue contains information related to the assessment, it is confidential under section 300i-2(a)(3). We note that the provisions you cite only apply to the vulnerability assessment itself, not to documents that may contain related information. Furthermore, these provisions only state that the vulnerability assessment is excepted under FOIA. Since FOIA only applies to federal agencies, its provisions are not applicable to records held by a governmental body of the State of Texas. *See* Open Records Decision No. 561 at 7 (1990). Thus, information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *But see id.* at 8 (stating that when federal entity shares confidential information with state agencies, that information remains confidential in the hands of state entity). After reviewing the document, your arguments and the cited provisions, we conclude that the document is not confidential under federal law. *See generally* Open Records Decision No. 478 (1987) (for purposes of Gov't Code § 552.101, statute must explicitly require confidentiality; confidentiality will not be implied from statutory structure).

Finally, you argue that this document is excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). Furthermore, in Open Records Decision 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in a final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such could be withheld pursuant to the statutory predecessor to section 552.111. On the other hand, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). Finally, section 552.111 does not apply unless the agencies between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

The document at issue contains purely factual information regarding the number and types of security cameras at a specific facility. You state and have submitted additional documents evidencing the fact that the city has incorporated some of this factual information into a policy document that is currently in draft status. As previously noted, the fact that this information has been utilized elsewhere does not, however, change the character of the information contained in the document before us. Since the document at issue is purely factual, we conclude that it is not excepted from disclosure under section 552.111 and must, therefore, be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

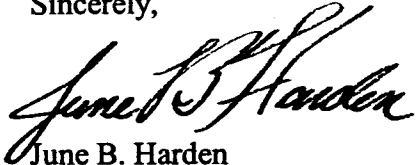
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 175023

Enc: Submitted documents

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